

1 SENATE CORPORATIONS AND TRANSPORTATION COMMITTEE SUBSTITUTE FOR  
2 SENATE BILL 604

3 **48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007**

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10 AN ACT

11 RELATING TO TRADE PRACTICES; CHANGING THE NAME OF THE RETAINAGE  
12 ACT TO THE PROMPT PAYMENT ACT; ELIMINATING PROVISIONS OF  
13 CHAPTER 57, ARTICLE 28 NMSA 1978 CONCERNING RETAINAGE;  
14 PROHIBITING THE WITHHOLDING OF AMOUNTS DUE FOR WORK PERFORMED;  
15 AMENDING AND REPEALING SECTIONS OF THE NMSA 1978.

16  
17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

18 Section 1. Section 57-28-1 NMSA 1978 (being Laws 2001,  
19 Chapter 68, Section 1) is amended to read:

20 "57-28-1. SHORT TITLE.--~~[This act]~~ Chapter 57, Article 28  
21 NMSA 1978 may be cited as the [~~Retainage~~] "Prompt Payment  
22 Act"."

23 Section 2. Section 57-28-2 NMSA 1978 (being Laws 2001,  
24 Chapter 68, Section 2) is amended to read:

25 "57-28-2. DEFINITIONS.--As used in the [~~Retainage~~] Prompt  
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underscored material = new  
[bracketed material] = delete

1 Payment Act:

2 A. "construction" means building, altering,  
3 repairing, installing or demolishing in the ordinary course of  
4 business any:

5 (1) road, highway, bridge, parking area or  
6 related project;

7 (2) building, stadium or other structure;

8 (3) airport, subway or similar facility;

9 (4) park, trail, athletic field, golf course  
10 or similar facility;

11 (5) dam, reservoir, canal, ditch or similar  
12 facility;

13 (6) sewage or water treatment facility, power  
14 generating plant, pump station, natural gas compression station  
15 or similar facility;

16 (7) sewage, water, gas or other pipeline;

17 (8) transmission line;

18 (9) radio, television or other tower;

19 (10) water, oil or other storage tank;

20 (11) shaft, tunnel or other mining  
21 appurtenance;

22 (12) electrical wiring, plumbing or plumbing  
23 fixture, gas piping, gas appliances or water conditions;

24 (13) air conditioning conduit, heating or  
25 other similar mechanical work;

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- 1 (14) leveling or clearing land;
- 2 (15) excavating earth;
- 3 (16) drilling wells of any type, including
- 4 seismographic shot holes or core drilling; and

- 5 (17) similar work, structures or
- 6 installations;

7 B. "contractor" means a person performing

8 construction through a contract with an owner;

9 C. "owner" means a person, local public body or

10 state agency other than the [~~state highway and~~] department of

11 transportation [~~department~~];

12 D. "person" means an individual, corporation,

13 business trust, estate, trust, partnership, limited liability

14 company, association, joint venture or similar legal entity;

15 and

16 [~~E. "retainage" means money payable to the~~

17 ~~contractor or subcontractor that has been withheld by the owner~~

18 ~~conditioned on substantial completion of all work in connection~~

19 ~~with a construction contract; and~~

20 F.] E. "subcontractor" means a person performing

21 construction for the owner not through a contract with the

22 owner."

23 Section 3. Section 57-28-3 NMSA 1978 (being Laws 2001,

24 Chapter 68, Section 3) is amended to read:

25 "57-28-3. APPLICABILITY OF ACT.--The provisions of the

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1 [Retainage] Prompt Payment Act do not apply to construction  
2 contracts for residential property containing four or fewer  
3 dwelling units."

4 Section 4. Section 57-28-5 NMSA 1978 (being Laws 2001,  
5 Chapter 68, Section 5) is amended to read:

6 "57-28-5. PAYMENTS--PROMPT PAY REQUIRED [RETAINAGE]--  
7 WITHHOLDING PROHIBITED.--

8 A. Except as provided in Subsection B of this  
9 section, all construction contracts shall provide that payment  
10 for amounts due [~~except for retainage~~] shall be paid within  
11 twenty-one days after the owner receives an undisputed request  
12 for payment. Payment by the owner to the contractor may be  
13 made by first-class mailing, electronic funds transfer or by  
14 hand delivery of the undisputed amount of a pay request based  
15 on work completed or service provided under the contract. If  
16 the owner fails to pay the contractor within twenty-one days  
17 after receipt of an undisputed request for payment, the owner  
18 shall pay interest to the contractor beginning on the twenty-  
19 second day after payment was due, computed at one and one-half  
20 percent of the undisputed amount per month or fraction of a  
21 month until the payment is issued. If an owner receives an  
22 improperly completed invoice, [~~he~~] the owner shall notify the  
23 sender of the invoice within seven days of receipt in what way  
24 the invoice is improperly completed, and [~~he~~] the owner has no  
25 further duty to pay on the improperly completed invoice until

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1 it is resubmitted as complete.

2 B. A local public body may make payment within  
 3 forty-five days after submission of an undisputed request for  
 4 payment when grant money is a source of funding, if:

5 (1) the construction contract specifically  
 6 provides in a clear and conspicuous manner for a payment later  
 7 than twenty-one days after submission of an undisputed request  
 8 for payment; and

9 (2) the following legend or substantially  
 10 similar language setting forth the specified number of days  
 11 appears in clear and conspicuous type on each page of the  
 12 plans, including bid plans and construction plans:

13 "Notice of Extended Payment Provision

14 This contract allows the owner to make payment within  
 15 \_\_\_\_\_ days after submission of an undisputed request for  
 16 payment.".

17 C. All construction contracts shall provide that  
 18 contractors and subcontractors make prompt payment to their  
 19 subcontractors and suppliers for amounts owed for work  
 20 performed on the construction project within seven days after  
 21 receipt of payment from the owner, contractor or subcontractor.  
 22 If the contractor or subcontractor fails to pay ~~his~~ the  
 23 contractor's or subcontractor's subcontractor and suppliers by  
 24 first-class mail or hand delivery within seven days of receipt  
 25 of payment, the contractor or subcontractor shall pay interest

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1 to [his] the subcontractors and suppliers beginning on the  
2 eighth day after payment was due, computed at one and one-half  
3 percent of the undisputed amount per month or fraction of a  
4 month until payment is issued. These payment provisions apply  
5 to all tiers of contractors, subcontractors and suppliers.

6 D. A creditor shall not collect, enforce a security  
7 interest against, garnish or levy execution on those  
8 [~~retainage~~] progress payments or other payments that are owed  
9 by an owner, contractor or subcontractor to a person, or [his]  
10 the owner's contractor's or subcontractor's surety, who has  
11 furnished labor or material pursuant to a construction  
12 contract.

13 E. When making payments, [~~the owner shall retain no~~  
14 ~~more than five percent of the cost of estimated work done and~~  
15 ~~the value of materials stored on the site or suitably stored~~  
16 ~~and insured off site. When the project is substantially~~  
17 ~~complete, no further retainage shall be withheld. A contractor~~  
18 ~~shall retain no more than five percent retainage, regardless of~~  
19 ~~whether retainage is withheld by the owner.~~

20 F. ~~The retainage may be held until substantial~~  
21 ~~completion of each separate building, public work or other~~  
22 ~~division of the contract on which a price is stated separately~~  
23 ~~in the contract or that can be separately ascertained from the~~  
24 ~~contractor's schedule of values if the escrow arrangement~~  
25 ~~described in Section 6 of the Retainage Act is used] an owner,~~

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1 contractor or subcontractor shall not retain, withhold, hold  
2 back or in any other manner not pay amounts owed for work  
3 performed."

4 Section 5. Section 57-28-11 NMSA 1978 (being Laws 2001,  
5 Chapter 68, Section 11) is amended to read:

6 "57-28-11. ATTORNEY FEES.--In an action to enforce the  
7 provisions of the [~~Retainage~~] Prompt Payment Act, the court may  
8 award court costs and reasonable attorney fees."

9 Section 6. REPEAL.--Sections 57-28-4, 57-28-6, 57-28-9  
10 and 57-28-10 NMSA 1978 (being Laws 2001, Chapter 68, Sections  
11 4, 6, 9 and 10) are repealed.

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